

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 99-CV-2496 (GK)
)	
v.)	Next Scheduled Court Appearance:
)	Trial (ongoing)
PHILIP MORRIS USA INC.,)	
f/k/a PHILIP MORRIS INC., <i>et al.</i> ,)	
)	
Defendants.)	

**NOTICE OF FILING OF THE WRITTEN
DIRECT EXAMINATION OF BENNETT S. LEBOW**

Pursuant to Order No. 471A, Defendant Liggett Group Inc. herewith files the Written
Direct Examination of Bennett S. LeBow.

Dated: New York, New York
March 28, 2005

Respectfully submitted,

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Written Direct: Bennett S. LeBow, US v. PM, CV-99-2496 (D.D.C.)(GK)

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WRITTEN DIRECT EXAMINATION OF
BENNETT S. LEBOW
SUBMITTED PURSUANT TO ORDER #471A

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1 **I. INTRODUCTION**

2 **Q:** **Please state your name for the record.**

3 A: Bennett S. LeBow.

4 **Q:** **Mr. LeBow, do you recall that you were called as a witness earlier in this action**
5 **during the government's case-in-chief?**

6 A: Yes I do.

7 **Q:** **Do you recall that several subject matters, including your background and your**
8 **opinions on certain smoking and health issues, were covered during your earlier**
9 **testimony?**

10 A: Yes I do.

11 **Q:** **Do you understand that we are not going to revisit and discuss those subject matters**
12 **here today, but we are going to cover some additional subject matters?**

13 A: Yes I do.

14 **II. LIGGETT'S SETTLEMENTS OF CERTAIN**
15 **SMOKING AND HEALTH LAWSUITS IN THE MID-1990s**

16 **Q:** **Mr. LeBow, did there come a time in the mid-1990s, when you took steps to settle**
17 **certain smoking and health litigations on behalf of Liggett?**

18 A: Yes.

19 **Q:** **Just briefly, what were the circumstances surrounding those settlements?**

20 A: In the mid-1990s, Liggett, along with the major tobacco companies (Philip Morris, R.J.
21 Reynolds, Brown & Williamson, Lorillard and American), was named as a defendant in lawsuits
22 brought by certain states' Attorneys General and in a nationwide class action lawsuit concerning
23 nicotine addiction, known as the *Castano* class action. Beginning in late 1995, under my
direction, Liggett negotiated a series of settlements of smoking and health litigation.

1 **Q: Can you describe the first of those settlements?**

2 A: Yes. In March 1996, after several months of negotiations with states' Attorneys General
3 and private plaintiffs' counsel, Liggett reached a settlement agreement which resolved the claims
4 of five states and a separate settlement agreement intended to resolve the *Castano* class action
5 lawsuit.

6 **Q: I would like to show you what has been marked as LGI Exhibit 11. Do you**
7 **recognize this document?**

8 A: Yes, that is a copy of the March 1996 Settlement Agreement between Liggett and the
9 Attorneys General of five states, Florida, Louisiana, Massachusetts, Mississippi and West
10 Virginia.

11 **Q: What sort of terms did Liggett agree to as part of the March 1996 Settlement**
12 **Agreement with those five states?**

13 A: The March 1996 Settlement Agreement is a complicated document with many terms and
14 conditions. Among the most significant terms were Liggett's agreement to withdraw its
15 opposition to FDA jurisdiction over cigarettes, and Liggett's agreement to comply with several
16 FDA proposed advertising and marketing restrictions, including termination of billboard
17 advertising in certain areas. Liggett further agreed to make certain financial payments to the five
18 states.

19 **Q: Was the March 1996 Settlement Agreement with the five states announced**
20 **publicly?**

21 A: Yes, the five states' Attorneys General that executed the Settlement Agreement held a
22 joint press conference on the day that the agreement was executed, announcing the fact of and
23 the terms of the Settlement Agreement. The announcement received enormous media attention.

1 **Q: I would like to show you what has been marked as LGI Exhibit 337. Do you**
2 **recognize this document?**

3 A: Yes, that is a copy of the Settlement Agreement between Liggett and plaintiffs' class
4 counsel in the *Castano* lawsuit, which Settlement Agreement was also executed in March 1996.

5 **Q: What sort of terms did Liggett agree to as part of the *Castano* Settlement**
6 **Agreement?**

7 A: The components of the *Castano* Settlement Agreement were very similar to the terms of
8 the March 1996 Attorneys General Settlement Agreement entered by Liggett. The *Castano*
9 Settlement Agreement, however, never became fully effective, inasmuch as the federal appeals
10 court decertified the *Castano* class two months after we entered in this settlement agreement.

11 **Q: I would like to show you what have been marked as LGI Exhibits 346, 347 and 351?**
12 **Can you identify these documents?**

13 A: Yes, these are examples of news articles written following the announcements of the
14 March 1996 Attorneys General and *Castano* Settlement Agreements. LGI Exhibits 346 and 351
15 were news stories that ran in *The Wall Street Journal*, and LGI Exhibit 347 was a news story that
16 ran in *The New York Times*.

17 **Q: Can you explain to the Court what the impact was to Liggett of having entered into**
18 **the March 1996 Attorneys General and *Castano* Settlement Agreements?**

19 A: The settlements were negotiated in absolute secrecy. Only one person at Liggett was
20 aware that settlement was being discussed and Liggett's long-time outside counsel had not been
21 informed. In fact, notwithstanding the fact that the company had at that point been a defendant
22 in smoking and health litigation for 40 years, I do not believe that settlement had ever been
23 discussed with an adversary before that time. When the settlements were announced in March

1 1996, there was a degree of unrest at the company, as some employees decided to leave the
2 company and outside litigation counsel resigned. Also, after March 1996, the company and its
3 representatives no longer participated in most industry-wide activities involving the other major
4 tobacco companies (Philip Morris, R.J. Reynolds, Brown & Williamson and Lorillard), such as
5 joint litigation defense meetings. Finally, immediately following the settlements, Liggett was
6 sued by several more states' Attorneys General. Within a few months of the March 1996
7 Settlement Agreements, over 12 additional states' Attorneys General had sued Liggett and the
8 other major tobacco companies.

9 **Q: Did Liggett take steps to resolve the additional lawsuits brought by other states'**
10 **Attorneys General?**

11 A: Yes, throughout the remainder of 1996 and in early 1997, Liggett held discussions with
12 the several additional states' Attorneys General who had filed suit, or had announced that they
13 would file suit. In March 1997, Liggett entered into a comprehensive agreement with 17
14 additional states' Attorneys General.

15 **Q: I would like to show you a document identified as LGI Exhibit 338? Is this a copy of**
16 **the March 1997 Settlement Agreement between Liggett and the seventeen additional states'**
17 **Attorneys General?**

18 A: Yes it is.

19 **Q: Can you briefly describe the terms of the March 1997 Settlement Agreement?**

20 A: As part of the March 1997 Settlement Agreement, Liggett agreed to make a public
21 statement acknowledging, among other things, that smoking is a cause of lung cancer and other
22 diseases and that smoking is addictive. Liggett also added a voluntary warning label on the
23 packs of its cigarettes which states, "Warning: Smoking is Addictive." Liggett also agreed to

1 further advertising and marketing restrictions, and most significantly, Liggett agreed to provide
2 cooperation and assistance to the states' Attorneys General in the prosecution of their ongoing
3 lawsuits against the major tobacco companies (Philip Morris, R.J. Reynolds, Brown &
4 Williamson and Lorillard).

5 **Q: How did Liggett cooperate with the states' Attorneys General?**

6 A: Following execution of the March 1997 Settlement Agreement, there were several ways
7 in which Liggett provided cooperation and assistance to the states' Attorneys General in their
8 continuing lawsuits against the major tobacco companies. Liggett agreed to waive attorney-
9 client privilege and work product protection with respect to internal Liggett-only privileged
10 documents relevant to smoking and health cases and produced such documents to the states. As
11 to joint defense privileged documents in Liggett's possession, Liggett produced many of those
12 documents to courts around the country for *in camera* reviews and Liggett's outside counsel
13 participated in efforts to have such documents de-privileged. These productions resulted in the
14 first sustained judicial decisions compelling the major tobacco companies to release privileged
15 documents. Liggett also cooperated by making its scientists and executives available for
16 informational interviews by the Attorneys General and their outside counsel and conducted
17 informational tours of Liggett's manufacturing facilities for counsel for the states and others in
18 the public health community. Finally, I and others affiliated with Liggett testified on behalf of
19 the states' Attorneys General in those cases where trials were commenced.

20 **Q: Were the terms of the March 1997 Settlement Agreement publicly disclosed?**

21 A: Yes. Much like the settlements reached a year earlier, Liggett's March 1997 Settlement
22 Agreement, particularly the public admissions regarding smoking and health issues and the
23 cooperation provisions, received front page nationwide publicity.

1 **Q: I would like to show you what have been marked as LGI Exhibits 348, 352 and 353,**
2 **which are news articles from March 1997. Do you recognize these articles?**

3 A: Yes.

4 **Q: Are these news articles typical of the media and news coverage that Liggett received**
5 **for the March 1997 Settlement Agreement?**

6 A: Yes, they are.

7 **Q: Did you or Liggett receive any public recognition from the states' Attorneys General**
8 **as a result of Liggett's cooperation and other conduct that you described?**

9 A: Yes. For example, in August 1997, twenty states' Attorneys General wrote an open letter
10 to Bruce Lindsey, then Deputy Counsel to the President of the United States, praising Liggett's
11 cooperation in the prosecution of their lawsuits. Similarly, former Florida Governor Lawton
12 Chiles and Florida Attorney General Robert Butterworth honored me in October 1997, after
13 Florida had reached a settlement with the major companies, with a proclamation citing Liggett's
14 "invaluable assistance" in procuring the state's settlement. President Clinton also publicly
15 acknowledged Liggett's settlements as a positive step in 1997.

16 **Q: I would like to show you what has been marked as LGI Exhibits 5, 345, 349, 350**
17 **and 355. Can you identify those documents for the Court?**

18 A: Yes, those include some of the open letters and other statements made by public officials,
19 the proclamation by the State of Florida, and the statement by President Clinton, all of which I
20 just described.

21 **Q: I'd like to show what has been identified as LGI Exhibit 8. Have you ever seen this**
22 **document before?**

1 A: Yes. It is an April 7, 1997 letter from the American Wholesale Marketers Association to
2 its members. My understanding is that it was sent to wholesalers throughout the tobacco
3 industry.

4 **Q: What is the American Wholesale Marketers Association?**

5 A: It is a trade organization that represents nearly all of the candy and cigarette wholesalers
6 and distributors in the country, including Liggett's wholesale customers.

7 **Q: Do you have an understanding as to whether this letter had an effect on Liggett's**
8 **sales?**

9 A: Yes. As you can read from the letter, in light of Liggett's March 1997 Settlement
10 Agreement, the trade organization was telling Liggett's customers that it was questionable
11 whether Liggett could be "trusted." In the wake of that letter, Liggett had a difficult time getting
12 its products on store shelves.

13 **Q: Did Liggett's volume and market share suffer as a result that year?**

14 A: Yes. Percentage-wise, in 1997, Liggett incurred what I believe was the largest drop in
15 market share for one company in the history of the industry.

16 **Q: Did Liggett ultimately reach settlements with the remaining states?**

17 A: Yes. Throughout 1997 and early 1998, Liggett continued to negotiate and enter into
18 settlements with additional states that sued or contemplated suing the tobacco companies. By
19 March 1998, Liggett had entered into Settlement Agreements with 41 states and a number of
20 United States territories.

21 **Q: Did Liggett thereafter become a signatory to the Master Settlement Agreement as**
22 **well?**

1 A: Yes. Liggett became a signatory to the Master Settlement Agreement in November 1998,
2 at the same time that the major companies entered that Agreement. Liggett and the 40-plus
3 states and territories with which it had previously settled agreed to replace the terms of their prior
4 agreements with the terms of the Master Settlement Agreement in order for, among other things,
5 there to be uniformity among the companies and the states with respect to advertising, marketing
6 and company conduct restrictions.

7 **Q: And does Liggett continue to be a signatory to the Master Settlement Agreement to**
8 **this day?**

9 A: Yes.

10 **Q: And has Liggett complied with all of the terms and conditions of the Master**
11 **Settlement Agreement, including, for example, the advertising restrictions, and the**
12 **prohibitions on marketing cigarette products to youth.**

13 A: Yes.

14 **Q: Has any state's Attorney General, since execution of the Master Settlement**
15 **Agreement, brought an action against Liggett, asserting that the company was not in**
16 **compliance with the terms and conditions of the Master Settlement Agreement.**

17 A: Certain Attorneys General did send us letters in connection with the advertising of the
18 Omni cigarette. However, no actions have ever been commenced against Liggett for violation of
19 the Master Settlement Agreement.

20 **III. LIGGETT'S CONDUCT TODAY**

21 **Q: Does Liggett today have a public position on the health and addiction risks of**
22 **smoking cigarettes?**

23 A: Yes. Since the company's settlements in March 1997, in connection with which Liggett
24 acknowledged that smoking causes disease and is addictive, the company's public position on

1 smoking and health issues has remained the same; that is, that cigarette smoking is cause of lung
2 cancer and other serious diseases and that smoking is addictive. Liggett continues to maintain
3 the additional, voluntary warning label "Warning: Smoking is Addictive" on its cigarette packs.
4 Liggett has also stated publicly that it agrees with the position taken on these issues as stated by
5 the United States Surgeon General and the public health authorities.

6 **Q: Since 1996, has Liggett to your knowledge participated in any industry-wide trade**
7 **meetings or organizations?**

8 A: To my knowledge, no. I am aware that we and the other companies are co-signatories to
9 the Master Settlement Agreement and co-defendants in certain lawsuits, and I am certain that
10 there are some meetings at which Liggett employees and/or representatives are together with
11 employees and/or representatives of other companies. I am not, however, aware of any other on-
12 going relationships between Liggett and any major tobacco company which is a defendant in this
13 action.

14 **Q: Mr. LeBow, I want to turn to a couple of things that Liggett does today that go**
15 **beyond the terms or requirement of any settlement agreements. Let's start with the issue**
16 **of ingredient disclosure. What has Liggett done in this regard?**

17 A: First, beginning in 1997, Liggett has been providing on an annual basis both to the
18 Centers for Disease Control and the Massachusetts Department of Public Health a complete
19 listing of all additives and ingredients in all of Liggett's cigarettes on a brand-by-brand, style-by-
20 style basis. And, moreover, the ingredients are listed in weight order as they appear in Liggett's
21 cigarettes. This is exactly what the public health authorities have requested, and I believe that
22 Liggett is the only one tobacco company to do so. In fact, I testified before the Massachusetts

1 Department of Public Health in favor of enacting a law that would require all of the companies to
2 provide complete ingredient and additive information to that agency on a confidential basis.

3 **Q: Does Liggett also provide ingredient information to its consumers?**

4 A: Yes. Liggett is the only domestic tobacco company that prints a list of ingredients on the
5 side of each carton of cigarettes that it sells.

6 **Q: What type of cigarettes does Liggett sell today?**

7 A: Liggett for the most part today manufactures and sells discount, non-branded cigarettes
8 that compete generally on price. Liggett has, I believe, only two premium brand cigarettes, Eve
9 and Jade, but they are both a very small part of Liggett's business. The discount cigarette
10 business comprises the dominant part of what Liggett does today.

11 **Q: Does Liggett engage in traditional consumer print advertising?**

12 A: Liggett today engages in virtually no print advertising. As I just stated, Liggett today is
13 largely in the business of discount, non-branded cigarettes and does not rely on traditional
14 consumer advertising to sell its products. To the extent that Liggett markets or advertises its
15 cigarette products, such as point-of-sale materials, the primary message in the marketing
16 materials is the price of the box or carton and a picture of the product.

17 **Q: And does Liggett Group have any international sales?**

18 A: No. Liggett is strictly a domestic tobacco company.

19 **Q: What is Liggett's market share for cigarettes sold in the United States today,
20 including Liggett's premium and discount sales?**

21 A: Liggett's market share is 2.4% of the cigarettes sold in the United States.

1 **Q: Does that make Liggett the fourth largest producer today in the United States,**
2 **behind only Philip Morris, Reynolds American (the new company recently formed by the**
3 **merger between R.J. Reynolds and Brown & Williamson), and Lorillard?**

4 A: No. A company named Commonwealth Brands produced more cigarettes in the United
5 States than Liggett in 2004.

6 **Q: And approximately how many employees does Liggett have today?**

7 A: Somewhere between 300-400 persons.

8 **IV. VECTOR'S REDUCED RISK CIGARETTE PROGRAM**

9 **Q: Mr. LeBow, let's talk briefly about Vector Tobacco Inc. What is Vector Tobacco**
10 **Inc.?**

11 A: Vector Tobacco Inc. ("Vector Tobacco") is a company that was formed in late 2000
12 primarily to do research and development on potential reduced risk cigarette products. Vector
13 Tobacco is an affiliate of Liggett as they both share the same ultimate parent company, Vector
14 Group Ltd.

15 **Q: What has Vector Tobacco done in pursuit of this objective?**

16 A: Vector Tobacco has vigorously pursued the research, development and marketing of
17 potential reduced risk cigarette products. Vector Tobacco has thus far created and marketed two
18 alternative cigarette products which we believe have the potential to reduce risk. In November
19 2001, Vector Tobacco launched a cigarette known as Omni. Omni had reduced levels of certain
20 key carcinogens in the cigarette smoke when compared to other conventional cigarettes available
21 on the market. Additionally, in December 2002, Vector Tobacco launched a cigarette known as
22 Quest. Quest utilizes genetically modified tobacco to provide reduced levels of nicotine in the
23 cigarette smoke. In addition to these specific products, Vector Tobacco is conducting additional

1 research to attempt to reduce risk in cigarette products. Vector Tobacco's mission is to develop
2 and market smoking products with science-based reductions in certain harmful elements.

3 **Q: Have any of Vector Tobacco's cigarette products to date proved to be commercially**
4 **successful?**

5 A: Omni was a failure in the marketplace. Vector is still manufacturing and selling Quest
6 and, while we have high hopes for Quest, we cannot yet say that it has proved to be a
7 commercial success. So the short answer is no.

8 **Q: Was the Omni marketed and sold as a "reduced risk" or "safer" cigarette?**

9 A: No, it was not. Recognizing that Omni had not been scientifically proven to reduce
10 health risks, Vector Tobacco was cautious with respect to its advertising and marketing efforts
11 for the Omni. Vector Tobacco qualified its claims for Omni as a "reduced carcinogen" cigarette,
12 with detailed explanations concerning the Omni product on its website and in voluntary
13 additional warnings in its advertising materials. In short, Vector Tobacco went public with the
14 facts concerning the reduced levels of carcinogens in the Omni as compared with other
15 conventional brand cigarettes, but was careful not to make health claims, express or implied.

16 **Q: What were the reasons that Omni failed in the market place?**

17 A: There were many reasons, but one of the key reasons was the lack of support and, to
18 some extent, opposition for Omni from the public health community, the states' Attorneys
19 General, the Federal Trade Commission, the Federal Drug Administration and other
20 governmental authorities. Vector Tobacco had a significant financial commitment in Omni and
21 believed strongly in the product. We believed that, even though it could not currently be proven
22 that Omni reduced risk, the hypothesis of reducing certain key carcinogens in the smoke was

1 sound. Before and after the launch of the Omni, Vector Tobacco sought the support of public
2 health authorities and other governmental and regulatory authorities for Omni. We made
3 numerous efforts to convince the public health authorities and other regulators that the marketing
4 campaign for Omni was not misleading, and that Omni was an improvement over conventional
5 cigarettes. Notwithstanding our efforts, we were confronted with opposition from regulators and
6 public health officials.

7 **Q: How did the lack of support from public health authorities affect marketing for the**
8 **Omni?**

9 A: Well, Vector marketed Omni as a “reduced carcinogen” cigarette product, and was
10 careful not to make health claims, express or implied about the product. But Vector’s marketing
11 analysis showed that consumers did not understand the “reduced carcinogen” marketing
12 campaign, and consumers were unable to differentiate the Omni from conventional “light”
13 cigarettes. We hoped that Omni could win the support of regulators and public health officials,
14 and that Vector could obtain their approval for a broader marketing campaign for Omni that
15 better explained the potential health benefits or potential reduced risk of the Omni as compared
16 to conventional cigarettes. However, Vector was unable to obtain support from the public health
17 authorities and other regulators for such a broader marketing campaign for Omni, and the Omni
18 ultimately proved unsuccessful in the market.

19 **Q: I would like to show you what has been marked as LGI Exhibits 559, 560, 561, 562**
20 **and 563, which is a January 14, 2002 letter from Dan Kracov, of Patton Boggs LLP, to the**
21 **Hon. Mike Fisher, the Attorney General of Pennsylvania and the Chairman of National**
22 **Association of Attorneys General Tobacco Enforcement Committee, with four separate**
23 **attachments. Have you seen this before?**

1 A: Yes, I have. This is one of several letters and presentations from representative of Vector
2 Tobacco to the various public health officials and regulators concerning advertising efforts for
3 Omni, and substantiation for the advertising for Omni.

4 **Q: I would like to show you what has been marked as LGI Exhibits 537, which is a May**
5 **22, 2002 letter from Mark E. Greenwold, Chief Counsel for the National Association of**
6 **Attorneys General, to the General Counsel of Vector Tobacco Inc., Marc Bell, Esq.,**
7 **concerning the advertising campaign for the Omni. Have you seen this letter before?**

8 A: Yes, I have.

9 **Q: Can you describe the context of this letter?**

10 A: Yes I can. This is again is one of many letters received by Vector Tobacco from
11 representatives of the states' Attorneys General, and other regulators, concerning the Omni, and
12 the advertising and marketing campaign for Omni. In this letter, the National Association of
13 Attorneys General (or "NAAG") expressed its belief that the advertising campaign for Omni
14 may have constituted the making of unsubstantiated health claims in violation of certain
15 provisions of the Master Settlement Agreement. We disagreed, but participated in a dialogue
16 with NAAG and others concerning the efficacy of Omni, and the advertising campaign for Omni.

17 **Q: I would like to show you what has been marked as LGI Exhibits 549? What is that?**

18 A: It is a powerpoint presentation that was made by representatives of Vector Tobacco,
19 including Anthony Albino, Ph.D., to NAAG on June 6, 2002. The presentation explained the
20 theory and science behind the Omni as compared to conventional cigarettes, and the need for an
21 advertising campaign that communicated the improvements in the Omni to consumers.

1 **Q: Notwithstanding the correspondence and meetings that you just described, did**
2 **NAAG, or any state Attorney General ever take formal legal action concerning the Omni**
3 **or the Omni advertising campaign?**

4 A: No, they did not.

5 **Q: How much did Vector spend on the development and marketing of the Omni?**

6 A: I don't have the precise numbers, but the figure is in excess of \$150 million dollars.

7 **Q: Mr. LeBow, let's talk briefly about Quest. Why did you want to develop Quest?**

8 A: We believe smoking can be addictive. By incorporating genetically modified tobacco,
9 we were able for the first time to make a cigarette product that tastes, burns and smokes like a
10 conventional cigarette, but with virtually no nicotine. We believe, and we are currently
11 conducting research to determine, if such a product may be useful to reduce or avoid addiction,
12 or as a smoking cessation device.

13 **Q: As a cigarette manufacturer, why would you want to provide consumers with a**
14 **product that would promote quitting?**

15 A: Because I am not interested in the long term viability of the conventional cigarette
16 market. I believe that conventional cigarettes are dangerous, and if I can develop a product that
17 will help people reduce risk, avoid addiction or quit smoking, I believe that is a good thing.
18 Ideally, my hope is that in a few decades a market for conventional cigarettes will no longer
19 exist.

20 **Q: I have no further questions Mr. LeBow. Thank you.**